

IT 96-52

Tax Type: INCOME TAX

Issue: Penalty Under 1002(d) - Failure To File/Pay Withholding

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE HEARINGS DIVISION  
CHICAGO, ILLINOIS

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THE DEPARTMENT OF REVENUE	)	
OF THE STATE OF ILLINOIS,	)	No.
	)	
Petitioner	)	
	)	
v.	)	
	)	SSN:
TAXPAYER,	)	
as responsible officer	)	
of CORPORATION	)	Linda K. Cliffel,
	)	Admin. Law Judge

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RECOMMENDATION FOR DISPOSITION

**APPEARANCES:** Lane Gensberg for TAXPAYER; Thomas Jacobsen, Special Assistant Attorney General, for the Illinois Department of Revenue.

**SYNOPSIS:**

This matter comes on for hearing pursuant to the protest of Notice of Deficiency ("NOD") Number 2053 for TAXPAYER (hereinafter "TAXPAYER") issued by the Department against him on April 7, 1994 as responsible party of CORPORATION (hereinafter referred to as "CORPORATION"). The NOD represents officers' liability for Withholding Tax admitted by CORPORATION as due to the Department for the fourth quarter 1990 but which is unpaid.

A hearing in this matter was held on February 7, 1995. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the taxpayer.

**FINDINGS OF FACT:**

1. CORPORATION was formed to develop and produce a notebook-sized computer.  
(Tr. pp 16-17, 417)

2. XXXXX provided the start-up capital for the company. (Tr. pp. 15, 17-24, 165-166)
3. TAXPAYER was Secretary of the corporation and together with XXXXX was considered to be part of the "investor group." (Tr. pp. 252, 255, 306)
4. VP was a Vice President of the company and provided the engineering expertise for designing the computer. (Tr. p. 129)
5. PRESIDENT was the President of CORPORATION and was in charge of the operation of the company. (Tr. pp. 124, 129-130)
6. VICE PRESIDENT was a Vice President of the company and was in charge of marketing and advertising. (Tr. p. 129)
7. The Directors of the corporation were XXXXX, TAXPAYER, PRESIDENT, VICE PRESIDENT, VP and ACCOUNTANT, the outside accountant for the company. (Tr. pp. 124 and 131) XXXXX was the Chairman the Board of CORPORATION. (Tr. p. 123)
8. ACCOUNTANT was the Treasurer of the corporation. (Tr. p. 131)
9. TAXPAYER and XXXXX owned TAXPAYER Technologies, Inc. (Tr. p. 30) TAXPAYER had offices TAXPAYER and equipment that was used by CORPORATION. (Tr. pp. 200-201, 316-318) TAXPAYER paid the salaries of VP and PRESIDENT and VICE PRESIDENT in 1989. (Tr. pp. 134, 200-201)
- 10.. TAXPAYER is an engineer and was able to provide information as to sources and suppliers to CORPORATION. He was not compensated for his services. (Tr. pp. 29, 254, 318)
11. The signature authority for the corporate bank account was held by XXXXX, TAXPAYER, PRESIDENT, VICE PRESIDENT, and VP. (Tr. p. 160)
12. Two signatures were required on corporate checks. Typically, PRESIDENT signed the checks and submitted them to TAXPAYER for countersignature. (Tr. pp. 164-165, 167)
13. TAXPAYER signed the IL-941 for the 4th quarter 1990. (Tr. pp. 333-365)
14. A meeting was held in January of 1991 to discuss the payroll tax situation. XXXXX agreed to fund the money needed to pay the payroll taxes on the condition that CORPORATION gave him a promissory note in that amount and PRESIDENT, VP,

and VICE PRESIDENT each give up a 5% equity holding in the company. (Tr. pp. 177-178)

#### CONCLUSIONS OF LAW:

The penalty at issue herein is based upon the withholding tax liability of CORPORATION for the fourth quarter of 1990. The corporation submitted to the Department the required tax return without payment for the amount stated therein. The Department seeks to impose personal liability on TAXPAYER pursuant to Ill. Rev. Stat. 1991, ch. 120, ¶1002(d),<sup>1</sup> which provides:

Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over...For purposes of this subsection, the term "person" includes an individual, corporation or partnership, or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs.

CORPORATION<sup>2</sup> was created to design and manufacture a notebook-size computer. The other principals in the corporation were VP, who provided the concept and the engineering knowledge, VICE PRESIDENT, who was in charge of marketing, PRESIDENT, who was in charge of operations, and XXXXX, who provided the funding. TAXPAYER was brought into the venture by XXXXX due to their business relationship in TAXPAYER Technologies, a corporation which they jointly owned. TAXPAYER was Corporate Secretary and a Director of CORPORATION.

TAXPAYER was not involved in the day-to-day activities of CORPORATION. TAXPAYER Technologies required his full-time commitment. He was not compensated by CORPORATION, and his role appears to be of an honorary nature. XXXXX, with

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<sup>1</sup> The liability for payroll taxes herein accrued in 1991. Therefore, the statute which applies is Ill. Rev. Stat. 1991, ch. 120, ¶1002(d). The Uniform Penalty and Interest Act, 35 ILCS 735/3-7, which provides for a personal liability penalty, is effective for taxes incurred January 1, 1994 and later.

<sup>2</sup> Originally formed as COMPUTER.

whom TAXPAYER had an ongoing business relationship, appointed him as an officer and shareholder. His input to CORPORATION was as a provider of information, i.e., what vendor could supply particular computer components.

Although he was the second signature on most checks, he did not have any decision-making role as to what expenses were paid. He testified, and it appears credible, that when the checks were presented to him for countersignature by PRESIDENT, he would sign them without review or discussion. He viewed his involvement as a rubber stamp. (Tr. p. 305)

TAXPAYER also signed the IL-941 for the relevant period. He testified that he was asked to sign the tax forms by Steven Kolber, the accountant for both CORPORATION and TAXPAYER since "there was no body else left" and TAXPAYER complied. Although TAXPAYER signed checks and tax returns, his involvement with CORPORATION was of a passive nature. He was completely unaware of the financial condition of the company. He was not provided with financial statements nor did he make independent inquiry of the financial status of CORPORATION. He did not know specifically which bills were paid or unpaid including the status of the withholding taxes.

Corporate office, *per se*, does not impose the duty to collect, account for and pay over payroll taxes. The duty imposed by the statute is generally found in high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of debtors and disbursement of funds. See, Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), *cert. denied* 400 U.S. 821 (1970).

TAXPAYER was an officer of the corporation in name only. It was convenient for CORPORATION to use him to attest to documents and provide the second signature on checks, but he had no decision-making responsibility for CORPORATION and had no control over the disbursement of funds. I find that TAXPAYER's activities for CORPORATION were insufficient to make him a responsible party, and that he has presented sufficient evidence to rebut the Department's *prima facie* case.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Deficiency be disallowed.

Date:

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Linda K. Clifffel  
Administrative Law Judge